SOUNDARA ACHI v. KALYANI ACHI & ORS.

[O. C. J. (Thomson, J.) May 19, 1953]

[Ipoh — Originating Summons No. 205 of 1952]

Hindu Law — Separate Property — Mitakshara system — Custom or usage outweighing the text of the law — Validity of simultaneous post-mortem adoption with the consent of nearest Sapinda — Probate and Administration Enactment (Cap. 8), ss. 4, 94, 102, 109 and 112 — Distribution of movable and immovable properties on intestacy — Distribution Enactment (Cap. 71) — Private International Law — Hindu Women's Rights to Property Act 1937 — Payment of debts, funeral and testamentary expenses, estate duty and expenses for realisation of assets — Whether payable out of movable or immovable property or both — Jurisdiction of Court to appoint guardian of property of minor domiciled and resident abroad — Jurisdiction to order payment of minor's property to guardian under the minor's law of domicil.

S.C., a Nattukottai Chettiar of Ramnad District, South India, governed by the Mitakshara system of Hindu law, and domiciled in India died intestate leaving separate property, movable and immovable, in the Federation of Malaya. He left two widows and two daughters. The Intestate did not authorise either widow to adopt a son for him. After his death both widows, with the consent of the Intestate's father (the nearest sapinda) simultaneously adopted a son each to the Intestate. On an application to ascertain the validity of the simultaneous adoptions, ascertainment of next-of-kin as regards both movable and immovable properties and other questions arising in the administration of the estate,

Held: (1) although under the strict rule of Hindu law simultaneous adoption is invalid nevertheless since under the Hindu system of law clear proof of usage outweighs the written text of the law and as the custom of simultaneous adoption amongst Nattukottai Chettiars in South India prevails and its validity has been upheld by the Courts of Madras, both adoptions are valid; (2) the distribution of movable and immovable properties of the Intestate is regulated by s. 4 of the Distribution Enactment (Cap. 71) which is a statutory recognition of the principles of Private International Law and therefore the immovable property should be distributed in accordance with the lex rei situs and movable property according to lex domicilii; (3) as regards movable property under the Hindu Women's Rights to Property Act 1937 the two widows are entitled to the same share as a son subject to the restriction that any interest devolving on a widow under the Act is "the limited interest known as a Hindu Woman's estate"; (4) as the husband's heirs during the lifetime of the widows have a mere spes successionis and not a vested remainder the question of ultimate destination of the widow's share in the movable property on the widow's death need not be considered; (5) the administration of the estate of a deceased person is governed entirely by lex loci; (6) the debts, testamentary and funeral expenses, estate duty and expenses of realisation of assets are payable out of all property of the Intestate movable or immovable without any differentiation; (7) in distributing the net assets among the local heirs and foreign heirs, all assets of the Intestate should be notionally converted to money and after payment of all liabilities the balance of assets should be notionally re-converted into their original forms of immovable and movable property based on the proportion they bore to each other at the moment of vesting in the administrator; (8) the Court has no jurisdiction to appoint a guardian of the property of a minor domiciled and residing abroad but, having regard to the fact that by the law of the minor's domicil the mother is entitled in her capacity as guardian of the minor to receive the fund and administer it during the minor's minority, she was entitled to receive the minor's share as trustee and no judicial appointment was necessary.

Cases referred to:—

(1) *Surendrakeshav Roy v. Doorgasundari Dassee* 19 I.A. 108.
(2) *Collector of Madura v. Moottoo Ramalinga Sathupathy* 12 Moo. I.A. 397, 436.
(3) *Achi v. Laksmi Achi & Ors.* (1946) A.I.R. (F.C.) 25.
(4) *Kamalabala Bose v. Jiban Krishna Bose* (1946) 50 C.W.N. 555.
(5) *In re Lorrillard* (1884) 28 Ch. 175.
(6) *In re Kloebe* (1922) 2 Ch. 638.
(7) *In re Gates* (1930) 1 Ch. 199.
(8) *In re Berchtold* (1923) 1 Ch. 192.
(9) *Brown v. Collins* (1883) 25 Ch. 56.
(10) *In re Chatard's Settlement* (1899) 1 Ch. 712.
(11) *Re Brown's Trust* (1865) 12 T.L.R. 488.

ORIGINATING SUMMONS.

S. K. Das for the applicant.

H. T. Ong for the 1st, 2nd, 3rd and 6th respondents.

Chin Swee Onn for the 4th respondent.

R. G. Suppiah for the 5th respondent.

Cur. Adv. Vult.

Thomson, J. : — This Originating Summons has been taken out by the joint administratrix of the estate of R. M. S. Sockalingam Chettiar (to whom I shall refer as 'the deceased') who died intestate at Taiping on 11th March, 1947, to have determined a number of questions which have arisen in the administration of his estate.

The deceased who belonged to the Nattukottai Chettiar community of Velayupatti Puddukottai, South India, was born in India and had his domicile there at the time of his death. Originally the property in which he was interested in Malaya was Hindu joint family property, but in 1946 a partition took place and apart from a few pieces of land held in trust, his estate at the time of his death consisted of his own separate property. The estate in Malaya, with which alone this Court is concerned, consists of immovable property valued at over $320,000 and movable property at $62,000 which latter valuation is probably very excessive as the movable property consists to a large extent of book debts of doubtful value. The exact amount of the liabilities of the estate, consisting of debts owed

by the deceased, testamentary expenses and estate duty, cannot be exactly determined at this stage, but though it is not great in relation to the value of the estate as a whole it may possibly exceed the value of the movable property.

The deceased left two widows, one of whom is the present applicant and the other of whom is the 1st respondent, and two natural daughters, one of them a minor, who are the 3rd and 5th respondents. Some time after his death each of the widows adopted a son to him and these adopted sons, one of whom is a minor to whom the Registrar of the Court has been appointed guardian *ad litem*, are the 2nd and 4th respondents.

On 29th April, 1948, Letters of Administration were granted to one Palanyappa Chettiar who at that time was the lawfully appointed attorney of the two widows, that is to say, of the present applicant and the present 1st respondent. Palanyappa Chettiar took certain steps in the administration regarding which I do not think there is any complaint, but on 17th March, 1952, at the suit of the present applicant the grant to him was revoked and letters of administration *de bonis non administratis* were granted to the present applicant and one Suppiah Velar the lawful attorney of the 1st respondent, the grant to the latter being for his principal's use and benefit and limited until his principal, the 1st respondent, should apply for and obtain Letters of Administration to be granted to her jointly with the applicant. This has not been done. The grant to Suppiah Velar is still in force and he having declined to join the applicant in the present proceedings has accordingly been joined to them as the 6th respondent.

All necessary parties have thus been joined and have entered appearance and all were represented by Counsel at the hearing of the Summons.

Before approaching the actual questions raised in the Summons, it is necessary to consider the validity of the *post mortem* adoption of the 2nd and 4th respondents as sons of the deceased by the two widows. The circumstances of these adoptions are set out in the applicant's affidavit which I accept as true. As has been said, the deceased died on 11th March, 1947. On 24th August, 1947, an agreement was executed to which the parties were the two widows and one Sithambaram Chettiar, the father of the deceased, which provided *inter alia* that each of the widows should adopt a son according to her own choice within a period of three years. On 30th August, 1950, two adoption ceremonies were performed at the same time in the same room of the same house by which the 1st respondent adopted the 2nd respondent who was a nephew of the deceased, and the applicant adopted the 4th respondent who was a relative of her own but apparently not related in any way to the deceased. Sithambaram Chettiar was present at these adoption ceremonies and consented to the adoptions which they solemnised and a number of other relatives of the deceased were also present. On the same day deeds of adoption were executed in respect of each adoption and although the attesting witnesses to each these deeds are not in each case the same each of the deeds was witnessed by Sithambaram Chettiar. On these facts, according to my understanding of Hindu Law, each of these adoptions considered by itself and without relation to the other would have been valid. Difficulty, however, arises from the fact that they were performed simultaneously.

The strict rule of Hindu Law would appear to be that a simultaneous adoption is invalid, (*Surendra-keshav Roy v. Doorgasundari Dassee*[1]) but "under the Hindu system of law clear proof of usage will outweigh the written text of the law" (*Collector of Madura v. Moottoo Ramalinga Sathupathy*[2]). From the judgment of the High Court of Madras in Appeal No. 436/41, which is not reported but of which I have been supplied with a certified copy, it is clear that among the Nattukottai Chettiar community of which the deceased was a member, the custom of simultaneous adoptions prevails and that the validity of such adoptions is upheld by the Courts of Madras. In the circumstances, I hold that the present adoptions were valid in the eyes of the law of India and must be so treated for the purposes of the administration of deceased's Malayan estate.

Having thus dealt with the question of the adoptions the way is clear to deal with the question of how the estate is to be distributed. The law on the subject is contained in the Distribution Enactment (Cap. 71) which follows the well known principle of private international law that in the case of intestacy immovable property should be distributed in accordance with the *lex rei situ* and movable property should be distributed in accordance with the law of the country in which the deceased had his domicile at the time of his death.

The immovable property of the deceased, then, falls to be distributed in accordance with the local law, which disregards adopted children and provides in effect that where a deceased person who is entitled by his personal law (as the deceased was) to a plurality of wives leaves surviving him more wives than one such wives shall share equally in the widow's share. Applying Rules Nos. 2 and 4 of section 7 of the Distribution Enactment the result is achieved that each of the two widows (i.e. the present applicant and the 1st respondent) is entitled to a one-sixth share and

each of the natural daughters (i.e. the 3rd respondent and the 5th respondent) is entitled to a one-third share.

As regards the movable property the distribution must be in accordance with the law of the place of deceased's domicile which is the Hindu Law of the Mitakshara School; and in this connection it is to be remembered that what I am concerned with here is the separate property of the deceased. Apart from the effect of the Hindu Women's Rights to Property Act, 1937 (India Act XVIII of 1937) I am satisfied that in India the two adopted sons would have succeeded equally to their adoptive father's separate property to the exclusion of the widows and the natural daughters. By that Act, however, the validity of which was at one time questioned but is now established, *Achi v. Laksmi Achi & Ors.*[3], it is provided that when a Hindu dies intestate leaving separate property, his widow (or if more than one widow all his widows together) is entitled in respect of any property in respect of which he died intestate to the same share as a son, subject to the restriction that any interest devolving on a widow under the Act is "the limited interest known as a Hindu woman's estate."

Applying the law as thus stated to the present case it is clear that each of the adopted sons (i.e. the 2nd respondent and the 4th respondent) is entitled to a one-third share in the movable property and each of the widows (i.e. the applicant and the 1st respondent) is entitled to a one-sixth share. The interest of each of the widows in the one-sixth share to which she is thus entitled is of course a "Hindu woman's estate" but I do not feel called upon to embark on any enquiry as to the precise extent of that interest for I do not think the question concerns the administration and distribution of the estate. In the case of *Kamalabala Bose v. Jiban Krishna Bose*[4], it was held that the effect of section 3(3) of Act XVIII of 1937 making the widow's share the limited interest of a Hindu woman's estate has the effect of giving to her deceased husband's heirs during her lifetime a mere *spes successionis* and not a vested remainder. In other words until one or other of the widows dies neither of the adopted sons can have any actual interest in her share. The question of the limited nature of the widow's shares can therefore in my opinion be safely disregarded in connection with the distribution of the estate and should any dispute arise between any of the parties hereafter it will have to be decided in the ordinary way presumably, as all the parties are residing in that country, in the Courts of India.

I now pass to the questions of whether the immovable property or the movable property is in the first instance liable for the payment of the estate duty, the testamentary expenses, the expenses in particular of realisation of the movable property and the debts of the deceased. In the ordinary way these questions would be of little or no practical importance but here by reason of the difference in distribution among the local heirs and the Indian heirs they are of course of very great importance.

As regards estate duty, I understand that the directions of the Court are no longer required for it is now agreed that the position is made perfectly clear by section 26(iii) of the Estate Duty Enactment, 1941. If I am wrong in so understanding I will of course give the necessary directions.

The administration of the property of a deceased person can be conveniently divided for purposes of discussion into two parts. The first is the getting in of the deceased's property and the payment of his debts. The second is the distribution of what is left to the persons beneficially entitled to it. In the first of these stages the legal representative of the deceased (whether he be executor or administrator) is governed by the provisions of the Probate and Administration Enactment (Cap. 8) and in the second stage he must also have regard to the provisions of the Distribution Enactment (Cap. 71).

I therefore now pass to an examination of what I consider to be the relevant provisions of these enactments.

First I take the Probate Enactment. By section 4 the administrator of a deceased person is his legal representative for all purposes and all the property of the deceased vests in him as such. There is here no distinction between movable and immovable property and although the Land Code contains certain provisions (sections 54, 155, 156, 157 and 158) dealing with the vesting of land these are clearly intended to give effect to the technical requirements of the land registration system and can in no way be said to add to or detract from the generality of the provision contained in section 4.

By section 94 the administrator is given the power to dispose as he thinks fit of all or any of the property thus vested in him by section 4. It is true that that power may only be exercised in respect of immovable property with the previous permission of the Court but it is to be observed that any disposal made without the permission of the Court is not void but merely voidable at the instance of any party interested in the property, and as no such restriction is placed on the exercise of the power of sale given by the section to executors it would be unsafe to infer from the restriction any principle other than that an administrator being appointed by the Court and not, like an

executor, by the deceased should be subject to a closer supervision by the Court than is an executor in his dealings with the deceased's property. In any event, while the section places a restriction on the disposal of immovable property it does not affect in any way the application of the proceeds of such a disposal nor create any distinction between such proceeds and the proceeds of sale of any movable property.

Then by section 102 the administrator is required to pay "all debts due by the deceased's estate", which clearly includes funeral, testamentary and administration expenses as well as the debts owed by the deceased, and then hand over the residue of the estate "if any" to the persons entitled to it. There is nothing whatever here to suggest that the debts or the residue are to be paid from any particular source or or are to invite the hypothecation of the proceeds of any particular sort of property. Indeed the wording of section 106 which provides for the payment of all debts equally and rateably "as far as the assets of the deceased will extend" seems to make it clear beyond doubt that everything vested in the administrator as such is to be regarded notionally as a single undivided fund out of which the debts of the estate are to be paid and the residue of which is then to be given to the persons entitled to it.

I am fortified in this view by a consideration of the provisions of the Enactment relating to the property of persons who die testate. I do not propose to go through these in detail but I would particularly mention section 109 which provides that if the assets of the estate after payment of debts, expenses and specific legacies are not sufficient to pay all the general legacies under the will in full then these general legacies "shall abate or be diminished in equal proportions" and section 112 which provides that where the assets are not sufficient to answer the debts and the specific legacies "an abatement shall be made from the latter rateably in proportion to their respective amounts" and which annexes to that provision a most illuminating illustration in the following terms :—

"A. has bequeathed to B. a diamond ring, valued at $500, and to C. a horse, valued at $1,000. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only $750. Of this sum $250 are to be paid to B. and $500 to C."

From these various provisions I arrive at the conclusions that so far as the administration of the property of a deceased person is concerned our law knows no difference in principle between movable and immovable property, that for the purposes of administration in this country there must be at the least a notional conversion of all the property of the deceased, whether movable or immovable, into terms of money and that what is to be distributed to the parties entitled under the law relating to intestate succession, or under the will of the deceased, as the case may be, is to be regarded notionally at any rate as an appropriate share of so much of the proceeds of the conversion as is left after payment out of them of the debts and expenses. It is true that in practice either by agreement among those concerned or by reason of the terms of a will what is actually handed over may often be something other than money but that does not affect the truth of the general proposition that what each beneficiary is entitled to is his share of the notional fund and that even the terms of a specific legacy can only be obeyed to such an extent as does not give the legatee more than his appropriate share.

I now proceed to a consideration of the Distribution Enactment (Cap. 71) which contains the local law relating to intestate succession and which contains the law by which the administrator must be guided when he reaches the stage in his duties when he is required by section 102 of the Probate Enactment "to hand over the residue of the estate (if any) to the person or persons entitled thereto."

It is provided by section 4 (i) of the Distribution Enactment :—

"The distribution of the movable property of a person deceased shall be regulated by the law of the country in which he had his domicile at the time of his death."

To my mind "the distribution of the movable property" can only refer to the distribution to the persons beneficially entitled thereto of so much of the movable property of the deceased person as remains in the hands of the legal representative after paying the debts of the deceased and the expenses of administration. I say so for reasons which I shall proceed to state.

In the first place the Enactment is entitled "An Enactment to make provision for the distribution of intestate estates" and from a consideration of section 6 and the rules contained in section 7 it is clear that the word "estate" is not used as meaning all the movable and immovable property possessed by the deceased at the time of his death but only so much of the property as is left "after payment thereout of the expenses of due administration as prescribed by the Probate and Administration Enactment".

Then, on any other view there would be an irreconcilable conflict between the provisions of the Enactment and those of the Probate Enactment which, as has been seen, make all the property of the deceased irrespective of its nature available to pay the debts and administration expenses and which only require the administrator to hand over to the beneficiaries so much of the proceeds of deceased's property as remains in his hands after doing so.

It is true that this conflict could be dealt with by admitting its existence and then saying that the provisions of the Distribution Enactment should prevail and that thus (for the matter must be carried to its logical conclusion) an administrator in whom the movable property of a person domiciled abroad becomes vested could not apply a cent of that property to payment of local debts and administration expenses even in a case where the debts and administration expenses and the value of the movable property were alike extensive and where there was no immovable property.

That such a conclusion would be very absurd is not a necessary reason why it should not be drawn but it seems to me that the question does not arise. The point is not covered by any local law but it is clearly covered by the English law to which by reason of section 2 of the Civil Law Enactment recourse must be had.

As to what is the English law there is no room for doubt. In the case of *In re Lorrillard*[5] the Court was concerned with the disposal of surplus assets in England in the hands of an English administrator of a deceased person whose domicile was in the State of New York and in the course of his judgment Eve, J., put the matter thus (at p. 642) :—

"I think the authorities clearly establish that the only surplus to which the law of domicile is applicable is such surplus as remains for distribution amongst the persons beneficially entitled to the estate, and that until the existence of such a surplus is demonstrated there is no room for the application of the law of domicile"

and when the matter came at a later stage before the Court of Appeal, Warrington, L.J., observed (at p. 645):—

"The principle is that the administration of the estate of a deceased person is governed entirely by the lex loci, and it is only when the administration is over that the law of his domicile comes in."

In *Westlake's* "Private International Law" (6th Edn. p. 134) there occurs the following passage which received judicial approval in the case of *In re Kloebe*[6] : —

"Every administrator . . . . . must apply the assets reduced into possession under his grant in paying all the debts of the deceased"

and a few lines later on the learned author observes :—

"Mediately, the rule is a consequence of the authority which English law attributes to the situs over the assets themselves, as distinct from the beneficial interest in the clear surplus of them; for it is by reason of that authority that English law first requires the assets to be possessed under a grant in the situs, and then establishes a concursus in order to clear from debt the assets so possessed before the law of the deceased's domicile can affect their beneficial surplus."

In view of the law of England as thus stated, I have no hesitation in saying that in so far as the provisions of the Distribution Enactment are in conflict with those of the Probate Enactment the latter provisions must prevail and that accordingly what is to be distributed by the administrator in accordance with the Distribution Enactment is what remains in his hands after paying the debts of the deceased and the expenses of administration. I think, too, that it follows as a corollary that nothing in the Distribution Enactment can affect the property of the deceased or the acts of the administrator until the administrator reaches the point in his administration when he is required to distribute the surplus in his hands. Until then everything must be regulated by the *lex loci*, that is the Probate Enactment.

As has been said, that Enactment draws no distinction between movable and immovable property and in effect provides that the estate shall be treated as a whole. How then is the administrator to apportion the surplus remaining in his hands at the close of his administration between the foreign heirs and the local heirs?

It was suggested in the course of argument that the matter should be dealt with by applying what is said to be the English rule that the personal property of the deceased is primarily liable for his debts and the administration expenses and that the personal property must be exhausted before recourse is had to the real property. For myself, I very much doubt if any such rule would be applied to-day by the English Courts, at least in any case when the deceased died after 1925. Be that as it may, I see no reason to call it in aid here. Based as it is not on any distinction between immovable property and movable property but on the English distinction between real property and personal property, I very much doubt if it is capable of intelligible application to this country. The question, however, does not arise.

As has been seen (and I do not propose to go over the ground in detail again) movable and immovable property vest alike in the legal representative (Cap. 8 — section 4) and all the property of the deceased is available for the payment of his debts and the administration expenses without regard to its nature. Subject to the statutory provisions relating to the priority of certain classes of debts, all debts including debts to the legal representative himself are treated alike and if the assets are not sufficient to pay them in full they are to be paid "equally and rateably, as far as the assets of the deceased will extend" (section 106). If the assets after payment of debts are insufficient to pay the general legacies in full "the latter shall abate or be diminished in equal proportion" (section 109) and when specific legacies cannot be paid they are to be abated "rateably in proportion to their respective amounts" (section 112).

From all this I have deduced the principle that so far as the assets are concerned the law requires that

they be notionally converted into money. I now deduce the further principle that so far as liabilities are concerned these are subject to the principle of rateable abatement and I see no reason for saying that this principle should not apply to the beneficiaries in an intestacy as well as to creditors and to legatees. When there is one class of heirs the application of these presents no difficulty. Where, as here, there are two classes of heirs these principles demand a notional re-conversion of the assets into their original forms of immovable and movable property based on the proportion they bore to each other at the moment of vesting in the administrator.

Before departing from the point I would observe that I am fortified in the views I have thus taken by a consideration of two English cases.

In the case of *In re Gates*[7], Farwell, J., was of the opinion that the parts of the English Administration of Estates Act, 1925, dealing with the devolution of the estate and with its administration of assets were separate and that the effect of the latter part was to throw "the funeral, testamentary and administration expenses, debts and liabilities on the real and personal estate rateably". I appreciate that the sections of the English statute which His Lordship had in mind differ to some extent from the corresponding sections of the local statute but to my mind the difference does not reflect any difference in principle but is rather due to the difference in the general legal framework of which each of these statutes forms a part.

Again the case of *In re Berchtold*[8] would seem to be authority for the proposition that for the purposes of devolution movable and immovable property may retain their separate existence although for purposes of administration they are treated alike.

If I am right in holding (and in my reasons for so holding) that the estate is to be treated as a whole and to be administered as a whole until the time comes for breaking it up by distributing it to the heirs it follows as a necessary corollary that it would be wrong to treat the expense of getting in any particular item of the assets as anything but an undistinguished part of the general expenses of administration and so as affecting in any way the ultimate distribution of the surplus. What vests in the administrator is the whole of the assets of the deceased and it is out of the common fund which they constitute that all the expenses are to be met.

I will be recapitulating what I have said hitherto in its detailed application to the various problems involved in the administration of this estate when the time comes for me to answer in form the questions embodied in the summons.

Before coming to that stage, however, there is one matter to be considered and that is the prayer that the present applicant be appointed guardian of the property of her minor daughter (the 5th respondent) and her minor adopted son (the 4th respondent).

On the material before me it would seem that the applicant is residing in Malaya but is domiciled in India. The two minors would appear to be both domiciled and residing in India.

In the circumstances, I do not think I have jurisdiction to make the order asked for (see *Brown v. Collins*[9]). In any event, I do not think a judicial appointment here is necessary. Under Hindu law the mother of a minor would appear to be entitled, failing the father, to the custody of the minor's separate property (see *Trevelyan*, "Hindu Law"; 3rd Edn., at page 231). In the case of *In re Chatard's Settlement*[10] money had been paid into Court under the provisions of the Trustee Relief Act and in the event was held in trust for two minors residing and domiciled in France, by the law of which country the father of the minors was their legal guardian and as such entitled to receive and give legal discharges for all monies coming to them during their minority. On an application that the money in Court be paid out to the father, Kekewich, J., said (at p. 716):—

> "I apprehend that . . . . . it would be quite right for me, if I thought fit, to direct the payment as asked. And further if the fund had not been paid into Court the trustee would have had a legal discharge if he had paid the money of the infants to their guardian."

Again, in the case of *Re Brown's Trust*[11] the Court ordered that a fund in Court held in trust for a minor domiciled in Prussia be paid out to his father on evidence that by the law of Prussia he was entitled (in his capacity as guardian of the minor) to receive the fund and administer it during the minor's minority.

Here there is no money in Court and I gravely doubt whether I have any discretion of any sort in the matter. As, however, the Court has been asked for directions I will direct that the minors' shares be paid to their mother in trust for them on the ground that by the law of India she is entitled to the custody of their property. It may be that by Hindu law her powers of dealing with the property are very limited but I do not think that is any concern of this Court in these proceedings.

Having arrived at these results, I am in a position to deal with the detail issues in the Summons which I do as follows.

A. In the events that have happened the testamentary expenses, debts and estate duty ought to have been paid and should be paid out of the property vested in the administrators as may be most prudent

and convenient without any differentiation of any sort between movable and immovable property. In this connection it is not considered that any consequential directions are necessary.

B. The expenses incurred in the realisation of the movable property are not payable primarily out of the movable property but out of all the property vested in the administrators without any differentiation of any sort between movable property and immovable property.

C. The residue of the estate remaining in the hands of the administrators after payment of the debts of deceased, the estate duty and testamentary and all other administrative expenses is distributable as follows :—

(a) So much of the said residue as bears the same proportion to it as does the gross value of the immovable property which became vested in the administrators to the gross value of all the property immovable and movable which became so vested is distributable as to one-sixth share each to the applicant and the 1st respondent and as to one-third share each to the 3rd respondent and the 5th respondent.

(b) So much of the said residue as bears the same proportion to it as does the gross value of the movable property which became vested in the administrators to the gross value of all the property immovable and movable which became so vested is distributable as to one-sixth share each to the applicant and to the 1st respondent and as to a one-third share each to the 2nd respondent and the 4th respondent. The right of the applicant and the 1st respondent to such one-sixth shares is subject to the restriction that it is what is known in Hindu law as a Hindu's woman's estate but as that restriction does not vest any interest in any person no directions regarding it can properly be given in these proceedings.

D. It is directed that the distributive shares of the 4th respondent and 5th respondent when ascertained be paid or transferred to the applicant in trust for them.

E. The applicant and the 6th respondent are at liberty to distribute the residue of the estate in accordance with the directions given by the Court in this Summons.

F. No other directions regarding the administration of the estate are considered to be necessary. There will, however, be liberty to apply.

G. As regards the costs in the present proceedings, the costs of the applicant and the 1st, 2nd, 3rd, 4th and 5th respondents as taxed on a solicitor-client basis will be borne by the estate. As regards the costs of the 6th respondent, I reserve the question and will deal with it, if I am asked to do so, after hearing argument.

WARD & ANOR v. PUBLIC PROSECUTOR.

[A. Cr. J. (Storr, J.) May 9, 1953]

[J.B. — Criminal Appeal No. 16 of 1953]

Penal Code, ss. 378 and 380 — Theft — Construction of s. 378 of the Penal Code — Sentence.

"Whoever in order to take with the intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means property which he does not intend to acquire, moved that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprive him permanently of it, is said to commit theft." When section 378 of the Penal Code is read in this way it is evident that it was the intention of the Legislature that it should be theft under the Code, to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them.

Case referred to :—

(1) *Queen-Empress v. Sri Churn Chungo* I.L.R. 22 Cal. 1021.

CRIMINAL APPEAL.

P. F. X. Leonard for the appellants.

M. Suffian (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Storr, J. : — In this case the two appellants, C. H. Ward and J. H. Lea, were convicted by the learned President of the Sessions Court, Johore Bahru, of the theft of certain articles, under section 380 of the Penal Code. Mr. Leonard appeared for the appellants and Inche Suffian, Deputy Public Prosecutor, appeared for the Public Prosecutor.

The main point argued in the appeal was that the evidence tended to show that the appellants, although they admitted taking the articles, did not take them with any criminal intention. The idea in their minds at the time of taking the articles was that in due course they would get the consent from the owner and when he required the articles they would return them to him. Although Mr. Leonard argued very forcefully that the appellants acted without criminal intention and as the owner would only have been deprived of possession of the articles for a short time there could be no offence, on looking up the authorities I have come to the conclusion that there is very little substance in this